IN THE

Supreme Court of the United States

October Term, 1976
No. 76-340

THE PEOPLE EX REL. JOHN K. VAN DE KAMP, as District Attorney, etc., *et al.*,

Petitioners,

vs.

PROJECTION ROOM THEATER, *et al.*,

Respondents.

(and four other cases)

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

DAVID M. BROWN,
FLEISHMAN, BROWN, WESTON & ROHDE,
A Professional Corporation,
433 North Camden Drive, Suite 900,
Beverly Hills, Calif. 90210,
Attorneys for Respondents.

STANLEY FLEISHMAN,
JOHN H. WESTON,
SAM ROSENWEIN,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-340

THE PEOPLE EX REL. JOHN K. VAN DE KAMP, as District Attorney, etc., *et al.*,

Petitioners,

vs.

PROJECTION ROOM THEATER, *et al.*,

Respondents.

(and four other cases)

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The Opinion of the California Supreme Court is reported at 17 Cal.3d 42, 130 Cal.Rptr. 328 (June 1, 1976).

Jurisdiction.

Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1257(3). Respondents contend that this Court lacks jurisdiction to issue a Writ of Certiorari herein because the June 1, 1976 decision of the California Supreme Court is not a "final judgment or decree" within the meaning of 28 U.S.C. §1257 and the interpretive decisions of this Court. Respondents will address themselves to the finality issue in detail hereafter.

Questions Presented.

1. Whether the June 1, 1976 decision of the California Supreme Court, reversing trial court judgments sustaining demurrers to Petitioners' Complaints, and remanding the cases for trial, constitutes a "final judgment or decree," within the meaning of 28 U.S.C. §1257.

2. Whether Petitioners have failed to raise a substantial federal question because the decision of the California Supreme Court is manifestly correct and consistent with this Court's decisions in *Art Theater Guild, Inc., et al. v. Ewing*, 421 U.S. 923, and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, fn. 23 and accompanying text.

Statement of the Case.

Petitioners, law enforcement officials of the City and County of Los Angeles, filed separate complaints against five (5) bookstores and motion picture theaters in the City of Los Angeles. Each of the complaints is essentially identical and alleges that the theaters and bookstores constitute public nuisances under both the general public nuisance statutes (California C.C. §3479, 3480, 3491; California P.C. §370) and under the specific provisions of the state Red Light Abatement Law (P.C. §11225 *et seq.*). The nuisance complained of is said to be "past and continuing exhibition" of magazines and films "all of which are lewd and obscene" under the laws of the state. The complaints seek preliminary and permanent injunctive relief, including specific forms of injunctive relief and forfeitures as provided for in the state Red Light Abatement Law, but not the general public nuisance statutes; to wit, closure of the premises for one (1) year, removal and sale of the fixtures and movable property

thereon used in conducting the alleged nuisance, and use of the proceeds from the sale to pay fees and costs in connection with the closure.

The trial court sustained Respondents' demurrers to the complaints without leave to amend and entered judgments of dismissal, ruling that Petitioners failed to state a cause of action either under the public nuisance statutes or the Red Light Abatement Law.

Petitioners appealed, and the California Supreme Court reversed the trial court's judgments of dismissal and remanded the cases for further proceedings consistent with the state Supreme Court's opinion. With respect to the Red Light Abatement Law, the court below agreed with the trial court and held, as a matter of legislative interpretation, that the Red Light Abatement Law was not intended to apply to the exhibition of obscene magazines or films. The ruling of the court below rejecting the applicability of the Red Light Abatement Law rests upon an adequate and independent state ground and is not subject to review. As noted, it is only the Red Light Abatement Law that provides for specific forms of relief including closure of the premises to any purpose for one (1) year.

With respect to the state's general public nuisance statutes, however, the court below disagreed with the trial court and held that Petitioners' complaints did state a cause of action upon which some relief could be granted by the trial court if the allegations of the complaints were proved. Because these cases came to the state Supreme Court following the trial court's sustaining of general demurrers, the Supreme Court's review was "considerably narrowed by application of the familiar rule" that " 'a general demurrer admits the truth of all material factual allegations in the com-

plaint' ", and the court below accordingly assumed that all magazines and films sold or exhibited at the premises in question were obscene within the meaning of the state obscenity statute, California P.C. §311. (130 Cal.Rptr. at 331).

After holding that Petitioners' complaints state causes of action under the state's general public nuisance statutes, the court below reviewed the possible forms of relief available to Plaintiffs in such actions. The court below concluded that:

> "The public nuisance statutes, unlike the Red Light Abatement law, do not provide for such specific forms of relief as temporary and perpetual injunction (P.C. §§11226-11227), removal and sale of fixtures, and closure of the premises for one (1) year (P.C. §11230). Instead, the District Attorney or City Attorney is, in general terms, empowered to being a civil action to 'abate' the public nuisance. (C.C.P. §731.) Further, ' "An abatement of a nuisance is accomplished in a court of equity by means of an injunction *proper and suitable* to the facts of each case. . . ." ' (italics added; Guttinger v. Calaveras Cement Co. (1951) 105 C.A.2d 382, (390) [233 P.2d 914]; see generally, McQuillin, Municipal Corporations, §24.73.)" (130 Cal.Rptr. at 337).

The court below then stated that if the trial court should find any of the materials to be obscene, after an adversary hearing on the merits, an injunctive order "proper and suitable" could be fashioned. The state Supreme Court added that under the general

public nuisance statutes, considered in the light of constitutional considerations respecting prior restraints of communication, a proper and suitable injunctive order would be one enjoining the exhibition and sale of the specific materials adjudged obscene after an adversary hearing, but not an order padlocking the bookstores or theaters themselves, or enjoining the exhibition or sale of materials not specifically so determined to be obscene. (130 Cal.Rptr. at 337-338).

The court below emphasized that the proceedings. "remain at the pleading stage" and that "Having determined that [Petitioners'] complaint is sufficient to state a cause of action based upon a general nuisance theory, we consider it inappropriate to describe in detail the precise dimensions of the injunctive and other relief which might be suitable in this and the related cases." (130 Cal.Rptr. at 339).

REASONS FOR DENYING THE WRIT.

1. The decision of the court below plainly lacks the requisite finality to satisfy the jurisdictional requirements of 28 U.S.C. §1257. The court below merely reversed the sustaining of general demurrers to the complaints without leave to amend, and remanded to the trial court for further proceedings, including trial. In this posture of the case, no books, magazines or films have been determined obscene after an adversary hearing on the merits, much less has there been any determination on the merits that respondents "continuously" sell and exhibit books, magazines and films "all of which are lewd and obscene". If Petitioners proceed to trial, and prove the allegations of their complaints, it remains for the trial court to fashion an equitable decree "proper and suitable to the facts of each case." As noted earlier, the state's general public nuisance statutes do not specify any particular forms of relief to which Petitioners would be entitled. Should Petitioners prevail at trial and be granted less relief than they believe themselves entitled to, they concededly have a right to appellate review wherein they may preserve their federal questions. Moreover, if any relief is granted Petitioners at the trial, it is inevitable that additional constitutional questions will be raised on appeal by Respondents, including but not limited to the obscenity *vel non* of some or all of the materials involved in these cases.

The decision of the court below, accordingly, is a classic example of a decision lacking the finality required to confer jurisdiction upon this court. A judgment or decree that is final within the meaning of 28 U.S.C. §1257 "must be subject to no further review or correction in any other state tribunal; it must also

be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551. This Court has, of course, encountered several categories of cases in which a state court judgment has been deemed final notwithstanding that further proceedings in the lower state courts were to come. These categories of cases recently were analyzed by the Court in *Cox Broadcasting Corp. v. Cohn*, ... U.S. ....., 95 S.Ct. 1029, 1037-1042. The present case bears none of the characteristics of any of the categories of cases outlined in *Cox* in which finality was found even though further state court proceedings were contemplated.

Thus, in most of the cases discussed in *Cox*, the additional state court proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, unlike the present case. See, 95 S.Ct. at 1037. In two categories of the aforesaid cases, the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain or they are wholly unrelated to the federal question. See, 95 S.Ct. at 1038-1039; see, *e.g.*, *Mills v. Alabama*, 384 U.S. 214; *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120.

The third category outlined in *Cox* involves situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. In these cases, "if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits,

however, the governing state law would not permit him again to present his federal claims for review." 95 S.Ct. at 1039; see, *e.g., California v. Stewart,* 384 U.S. 436; *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156. The present case has nothing in common with the latter category, since Petitioners are entitled to appeal from a judgment after trial, and to preserve their federal questions, regardless of whether they lose on the merits, or prevail on the merits but are not granted all the relief to which they consider themselves entitled.

Finally, this case is wholly unlike the final category of cases analyzed in *Cox*. In those cases, the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review in this Court might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. Cases presenting such circumstances have been accepted for review if a further condition is satisfied, namely, that a refusal immediately to review the state court decision might seriously erode a federal policy. See, 95 S.Ct. at 1040-1041; see, *e.g., Local No. 438 v. Curry,* 371 U.S. 542; *Mercantile National Bank v. Langdeau,* 371 U.S. 555; *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 94 S.Ct. 2831; *Hudson Distributors v. Eli Lilly,* 374 U.S. 386. Unlike those cases, Petitioner here cannot prevail at trial on nonfederal grounds, nor could this Court's reversal of the decision of the

court below at this stage of the proceedings preclude further litigation on the merits in the state courts. Moreover, this is hardly a case in which this Court's refusal immediately to review the state court decision might seriously erode a federal policy. For what is here at stake is not, as Petitioners claim, the ability of a state to enforce its policy against the commercial dissemination of obscenity, but rather whether this Court will give its blessing to particular forms of broad injunctive relief against obscenity which never have achieved even the slightest indication of approval in any of this Court's prior decisions, and which state courts throughout the nation uniformly have condemned.[1]

2. Petitioners' contentions on the merits fail to raise a substantial federal question warranting the grant of a writ of certiorari. Petitioners argue that the First and Fourteenth Amendments are not offended by injunctive orders padlocking theaters and bookstores for a year following a finding of their past sale and exhibition of obscene materials. They argue that such padlock orders are not forbidden prior restraints on freedom of speech and press. Petitioners additionally contend that there is no constitutional impediment to perpetual injunctions enjoining persons from disseminating any obscene matter in the future, following a finding that they have disseminated particular materials determined to be obscene. These sledgehammer forms of injunctive relief never have received approval from this Court,

---

[1]This case is most emphatically unlike *Cox* itself, in which "the litigation could be terminated by our decision on the merits and that a failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt. . . ." 95 S.Ct. at 1041-1042.

but rather have been condemned as impermissible prior restraints of expression. See, *Near v. Minnesota,* 283 U.S. 697; *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58; *Freedman v. Maryland,* 380 U.S. 51; *Organization for a Better Austin v. Keefe,* 402 U.S. 415; compare *Kingsley Books, Inc. v. Brown,* 354 U.S. 436.

Petitioners place their principal reliance upon this Court's decision in *Art Theater Guild, Inc. v. Ewing,* 421 U.S. 923, in which this Court dismissed for want of a substantial federal question an appeal from the Ohio Supreme Court's decision in *State ex rel Ewing v. "Without a Stitch"*, 307 N.E.2d 911 (Ohio, 1974). But this Court's treatment of the "Without a Stitch" decision not only fails to support Petitioners' arguments, but on the contrary clearly establishs the correctness of the California Supreme Court's opinion below.

The "*Without a Stitch*" decision involved an Ohio nuisance statute which, on its face, authorized a one-year padlock order for premises found to have disseminated obscene materials. But the Ohio Supreme Court in "*Without a Stitch*" narrowly construed the statute so that, in substance and effect, it authorizes injunctive relief no broader than that authorized by the California Supreme Court herein. That is to say, following a finding that a theater exhibited an obscene film, the Ohio statute as narrowed provides for a padlock order, but such order may be vacated immediately upon the property owner's appearance, payment of costs, and posting a bond conditioned upon the owner's ability to prevent the recurrence of the nuisance. The nuisance, however, is simply the exhibition of the particular film found obscene. Thus, the Ohio statute as construed in "*Without a Stitch*" is the substantial equivalent of the nuisance proceedings and relief author-

ized by the court below, to wit, a permanent injunction under the public nuisance statutes against particular materials adjudged obscene after an adversary hearing.

Respondents' reading of the "*Without a Stitch*" opinion is fortified by this Court's discussion of that case in *Huffman v. Pursue, Ltd.*, 420 U.S. 529, fn. 23 and accompanying text. In *Huffman,* this Court characterized the "*Without a Stitch*" case as having "narrowly construed the Ohio nuisance statute, with a view to avoiding the constitutional difficulties which concerned the District Court." In Footnote 23, this Court explained that:

> "In '*Without a Stitch*' it was decided that the closure provisions of Ohio Rev.Code Ann. §3767.06 were applicable even if a theatre had shown only one film which was adjudged to be obscene. However, *the Ohio Supreme Court was concerned with the constitutional implications of prior restraint of films which had not been so adjudged.* In narrowing the statute the court noted that §3767.04 specifies conditions under which a release may be obtained from the closure order: the property owner must appear in court, pay the cost incurred in the action, file a bond in the full value of the property, and demonstrate to the court that he will prevent the nuisance from being reestablished. The Court then made this *critical clarification:*
>
> " '*The nuisance is the exhibition of the particular film declared obscene.* The release provisions do not, as appellants contend, require the owner to show that no film to be exhibited during the one-year period will be obscene. Such a requirement would not only be impossible, as a practical

> matter, but also would be an unconstitutional prior restraint. . . .' 37 Ohio St.2d, at 105, 307 N.E.2d, at 918." (420 U.S. 529, fn. 23) (Emphasis added).

Plainly, Petitioners' claim that broad padlock orders and injunctions against the dissemination of materials not yet adjudged obscene are remedies which satisfy the First and Fourteenth Amendments finds no support in this Court's treatment of the "*Without a Stitch*" opinion, nor in any other decision of this Court.

Finally, it should be noted that the overwhelming weight of authority throughout the nation condemns as unconstitutional prior restraints, the forms of relief sought by Petitioners herein. See, *General Corporation v. State ex rel Sweeton,* 320 So.2d 668, 675 (Ala. 1975); *State of Kansas v. A Motion Picture Entitled "The Bet",* 547 P.2d 760 (Kan. 1976); *Gulf States Theaters of Louisiana, Inc. v. Richardson,* 287 So.2d 480, 489 (La. 1973); *Mitchum v. State ex rel Schaub,* 250 So.2d 883, 886-887 (Fla. 1971); *New Riviera Arts Theater v. State,* 412 S.W.2d 890, 893-895 (Tenn. 1967); *Sanders v. State,* 203 S.E.2d 153, 156-157 (Ga. 1974); *State ex rel Little Beaver Theater, Inc. v. Tobin,* 258 So.2d 30, 32 (Fla. App. 1972); *State ex rel Ewing v. "Without a Stitch", supra.*

In the light of all the decisions of this Court previously cited, and the decisions of the state courts throughout the nation, it is manifest that Petitioners have failed to raise a substantial federal question.

Conclusion.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DAVID M. BROWN,
FLEISHMAN, BROWN, WESTON & ROHDE,
A Professional Corporation,
Attorneys for Respondents.

STANLEY FLEISHMAN,
JOHN H. WESTON,
SAM ROSENWEIN,
Of Counsel.